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20 Plaintiff, Cat's Meow of Vegas, LLC d/b/a Cat's Meow

21 UNITED STATES DISTRICT COURT

22 DISTRICT OF NEVADA

23 CAT'S MEOW OF VEGAS, LLC d/b/a Cat's
24 Meow,

25 Case No.: 2:20-CV-02055-APG-NJK

26 **PLAINTIFF'S POST-EVIDENTIARY
HEARING BRIEF**

27 Plaintiff,

28 vs.

29 THE STATE OF NEVADA, COVID-19
30 MITIGATION AND MANAGEMENT TASK
31 FORCE; STEVE SISOLAK, in his official capacity
32 as Governor of Nevada; AARON FORD, in his
33 official capacity as Attorney General of Nevada;
34 BARBARA CEGAVSKE, in her official capacity as
35 the Nevada Secretary of State; CITY OF LAS
36 VEGAS; CAROLYN GOODMAN, in her official
37 capacity as Mayor of the City of Las Vegas;
38 ROBERT SUMMERFIELD, in his official capacity
39 as Director of the City of Las Vegas Department of
40 Planning; and CALEB CAGE, in his official
41 capacity as Chairman of the COVID-19 Mitigation
42 and Management Task Force,

43 Defendants.

INTRODUCTION

Granting the requested injunction boils down to whether the Defendants (also, the “State”) have met their burden of demonstrating that the Directive’s restrictions are narrowly tailored. They have not. The restrictions amount to a one-size-fits-all ban that is grossly disproportionate to the interest served—as evinced by the lesser restrictive means applied to activities that are similar or present similar risk factors. Potently, however, the State admits the risk of COVID-19 transmission related to karaoke *could* be mitigated to acceptable levels, but doing so would be difficult to enforce. This justification has been uniformly rejected.

What is more, even if making the government’s job easier was an appropriate way to satisfy narrow tailoring, the State fails to meet its burden. Since it is the government’s burden to demonstrate a restriction on speech is narrowly tailored, it is not entitled to the assumptions necessary to buoy its proffered justification. For example, the State claims a lack of staffing while admitting it has not engaged all of its available resources.

Further casting doubt on the Directive’s constitutionality, the Supreme Court has enjoined restrictions placed on religion during this Pandemic and has previously stated that Free Speech claims are entitled to the same protections afforded Free Exercise claims.

ARGUMENT

I. INTERMEDIATE SCRUTINY’S NARROW TAILORING STANDARD AND THE GOVERNMENTS’ FAILURE TO MEET IT

a. *Intermediate Scrutiny’s Narrow Tailoring Requirements*

Any modern analysis of intermediate scrutiny’s narrow tailoring standard must begin with McCullen v. Coakley, 573 U.S. 464 (2014), and McCutcheon v. Fed. Election Comm’n, 572 U.S. 185 (2014). These two cases complete the shift *away* from the deferential standard of United States v. Albertini, and to an enhanced obligation placed on the government. 472 U.S. 675, 689 (1985) (noting narrow tailoring is satisfied “so long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.”).¹ The Supreme Court recently

¹ Albertini is the case both Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 213 (1997) and Turner

1 restated the current standard as: “the law must not ‘burden substantially more speech than is necessary
 2 to further the government’s legitimate interests.’” Packingham v. North Carolina, 137 S. Ct. 1730,
 3 1736 (2017) (quoting McCullen, 573 U.S. at 486). The Ninth Circuit added, this standard “has bite”
 4 and is “a demanding test” that requires a “searching inquiry” and “scrutinize[s] a challenged law with
 5 a healthy dose of skepticism,” void of any “*Chevron*-like deference[.]” Duncan v. Becerra, 970 F.3d
 6 1133, 1165, 67 (9th Cir. 2020).

7 Case law provides three principles to guide courts applying this standard. The first is fit. The first means chosen must closely fit the government’s goal. McCullen, 573 U.S. at 486; *see McCutcheon*,
 8 572 U.S. at 218 (noting, “fit matters”). This “close fit” requirement serves as a backstop to prevent the
 9 government from too quickly choosing efficiency over speech. McCullen, 573 U.S. at 486. This Court
 10 expounded upon this “close fit” standard noting the chosen means “need not be the least restrictive”
 11 option, but “*the existence of ‘obvious, less burdensome alternatives’* is a relevant consideration in
 12 determining whether the restriction meets this test.” Ashley v. City of Las Vegas, No. 216-cv-02053,
 13 2016 WL 6996999, at *3 (D. Nev. Nov. 27, 2016) (emphasis added) (quoting Berger v. City of Seattle,
 14 569 F.3d 1029, 1041 (9th Cir. 2009)). Thus, under a skeptical review with bite, if there are obvious
 15 and less burdensome alternatives to the Directive’s restrictions, the Directive fails.

16 The second is proportionality. The government’s chosen means must be ““in proportion to the
 17 interest served[.]”” McCutcheon, 572 U.S. at 218 (quoting Bd. of Trustees of State Univ. of N.Y. v.
 18 Fox, 492 U.S. 469, 480 (1989)). Again, this Court has expounded upon this “proportionality”
 19 requirement noting this requirement is *not* satisfied “if a ‘substantial portion of the burden on speech
 20 does not serve to advance its goals.’” Deans v. Las Vegas Clark Cty. Library Dist., 220 F. Supp. 3d
 21 1058, 1064 (D. Nev. 2016) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799-800 (1989)).
 22 Thus, if a greater portion of the burden on speech does not serve to reduce the risk of COVID-19
 23 transmission, the Directive cannot meet narrow tailoring.²

24
 25
 26 Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662 (1994) cite for this obsolete deferential standard.

27 ² These principles are supported throughout the United States Courts of Appeals’ jurisprudence:

28 • The First Circuit notes McCullen, “placed particular weight on two key factors[.]” 1) “a
 mismatch between the narrowness of the problem and the breadth of the solution”—a “close fit”—

1 The final standard is the government’s burden to “*demonstrate* that alternative measures that
 2 burden substantially less speech *would fail to achieve the government’s interests*, not simply that the
 3 chosen route is *easier.*” McCullen, 573 U.S. at 467 (2014) (emphasis added).

4 **b. *The Directive’s Inability to Meet Those Requirements and the State’s Failure to***
 5 ***Carry Its Burden***

6 The Directive fails to meet the modern narrow tailoring requirements and the State has failed
 7 to demonstrate, beyond unsupported argument, how any of the lesser restrictive means it employs for
 8 any number of other businesses would fail to achieve its COVID-19 transmission reduction interest.

9 First, it is not a close fit for the Directives to completely ban karaoke, even though the danger
 10 of COVID-19 transmission stems only from the particulate expelled from a performer’s mouth. The
 11 State readily admits this danger is sufficiently mitigated for the unmasked “ambiance” singer in a
 12 restaurant with 6-foot distancing regardless of whether that singer consumes alcohol prior to her

13 and 2) that the state had not “undertook to address the problem . . . with less intrusive tools readily
 14 available to it” as other jurisdictions had—again, a “close fit” requirement. Reddy v. Foster, 845 F.3d
 15 493, 498 (1st Cir. 2017); *see also* Cutting v. City of Portland, Maine, 802 F.3d 79, 86 (1st Cir. 2015)
 16 (commenting that “seemingly tailored aspects of an untailored restriction on speech . . . do not
 automatically save such a restriction”).

17 • The Second Circuit supports Ashley’s less burdensome alternatives approach noting, “the
 18 government must show that it ‘seriously undertook to address the problem with *less intrusive tools*
 19 *readily available to it.*’” Agudath Israel of Am. v. Cuomo, No. 20-3572, 2020 WL 7691715, at *8 (2d
 20 Cir. Dec. 28, 2020) (quoting McCullen, 573 U.S. at 494); *see also* Kass v. City of New York, 864 F.3d
 21 200, 208 (2d Cir. 2017) (quoting McCullen, 573 U.S. at 486) (A “restriction on free speech is narrowly
 22 tailored if it does not ‘burden substantially more speech than is necessary to further the government’s
 23 legitimate interests.’”).

24 • The Third Circuit also echoes Ashley, as it requires: “the government must show that it tried
 25 or ‘seriously considered substantially less restrictive alternatives,’” when “a restriction imposes a
 26 significant burden on speech[.]” Reilly v. City of Harrisburg, 790 F. App’x 468, 473 (3d Cir. 2019)
 27 (quoting Bruni v. City of Pittsburgh, 941 F.3d 73, 89 (3d Cir. 2019)).

28 • The Fourth Circuit noted McCullen, “makes it clear that intermediate scrutiny does indeed
 29 *require* the government to present *actual evidence* supporting its assertion that speech restriction does
 30 not burden substantially more speech than necessary; *argument unsupported by the evidence will not*
 31 *suffice to carry the government’s burden.*” Reynolds v. Middleton, 779 F.3d 222, 228–29 (4th Cir.
 32 2015) (emphasis added).

33 • The Tenth Circuit notes McCullen, “expressly rejected the argument that the government could
 34 choose a particular means of achieving its interest merely because that method was easier to
 35 administer.” Verlo v. Martinez, 820 F.3d 1113, 1137 (10th Cir. 2016).

1 performance. [Record, at p. 151:13-17]. Further, the State admits this danger is sufficiently mitigated
2 in a bar airing the College Football National Championship where, again, the State admits fans are
3 likely to be consuming alcohol unmasked, yelling, and talking loudly; thus, more closely. [Record, at
4 pp. 70-71; 129-30]. But, for some reason, these risks are sufficiently mitigatable and mitigation
5 measures are more easily enforced in those instances than in Cat's. A close fit for karaoke would be,
6 for example, imposing any, or even all, of the restrictions applicable to those businesses. The karaoke
7 ban is a matter of convenience; not a close fit.

8 Moreover, as Ashley noted, a strong indicator that the Directive lacks a close fit is the existence
9 of obvious lesser restrictive options. In fact, the State employs those less burdensome alternatives for
10 similar constitutionally protected entertainment venues, as noted in the preceding paragraph, as well
11 as *non*-constitutionally protected businesses. For example, a person may sprint on a treadmill 6-feet
12 from another, [ECF 1-11, at ECF p. 20], or bowl; get a haircut, a tattoo, or piercing; and watch a movie
13 2-feet away from another, with the use of a barrier. [Id., at ECF pp. 10, 33, 41; Record, at p. 62:9-15].
14 Further examples abound. *E.g.*, [Record, at p. 71:5-19 (distancing for bars serving alcohol with
15 entertainment); p. 72:1-6 (capacity limits for smaller live entertainment venues); p. 73:11-17 (“certain
16 conditions in place”—distancing and capacity, for unmasked, inebriated ambient singers); p. 105:15-
17 20 (distancing, capacity, and masking for houses of worship)]. Yet, to achieve the same goal the State
18 achieved with those businesses, the State bans karaoke—a convenient but spacious fit.

19 Second, when comparing the proportionality of the burden placed on entertainment as a whole
20 to achieve COVID-19 reduction, karaoke is disproportionately burdened. College football may be
21 shown in alcohol-serving establishments where the State admits patrons may be cheering, talking
22 loudly, and remaining for extended periods of time—all risk factors the State identified at Cat's,
23 [record, at pp. 70-71]—but the Directive subjects this form of entertainment to only capacity
24 restrictions, a mask mandate, and 6-foot distancing. Likewise, COVID-19 transmission is reducible to
25 acceptable levels when a performer, consuming alcohol, leaves the patron area, takes the stage,
26 unmasks and, using a sanitized shared microphone, performs, and then returns to the patron area to
27 continue imbibing in/at the same event venue or restaurant, while another performer takes the stage—

1 but not in Cat's. [Record, at pp. 71-74; 151:13-16]. This scenario can include any number of
 2 performers, so long as they are "professionals" and not "amateurs." [Id., at pp. 72-74].

3 Finally, the State has not demonstrated that alternative measures would fail to achieve its
 4 interest. In fact, the State demonstrated that lesser means in fact *would* sufficiently achieve its interests.
 5 Specifically, when asked "the risk of COVID-19 from karaoke could be mitigated to a degree at least
 6 comparable to the risk of a gym . . . right? As a matter of policy[.]" the State responded, "yes, that is
 7 true." [Record, at p. 74:11-17; *see also* id., at p. 124:20-25 (noting, but for enforcement issues, it is
 8 possible)].³ In addition, for each risk factor the State identified, it could not provide a factual basis for
 9 the differences in restrictions placed on various businesses. For example, the State admitted length of
 10 time spent indoors is a COVID-19 risk factor, but also admitted it conducted no fact-finding as to how
 11 long a person spends at 1) a karaoke event; 2) a bar with ambient music; or 3) a gym. [Record, at p.
 12 148-49; *see also* id., at p. 151:9-11]. Despite not having engaged in any fact-finding, however, the
 13 State concluded the only way to mitigate this risk for karaoke is to ban it.

14 The State has not met its burden and the Directive is loosely tailored.

15 **II. THE COURT'S QUESTION: WHETHER A STATE'S ABILITY TO ENFORCE OR
 16 POLICE RESTRICTIONS IS A LEGITIMATE CONCERN UPON WHICH A STATE
 17 MAY BASE ITS RESTRICTIONS IN THE CONTEXT OF A FIRST AMENDMENT
 18 CLAIM?**

19 No. A restriction on speech is not narrowly tailored simply because it is easier for the government
 20 to enforce. "No," has been the Supreme Court's answer since at least 1939. And, "no" is how a sister
 21 court recently answered the same two assertions Nevada makes here.

22 **a. *The Heart of the Court's Question: Can Impossibility of Enforcement Sufficiently
 23 Justify Restrictions on First Amendment Rights?***

24 No. "No," was a sister court's answer to New Jersey's similar attempt in a prisoner rights case.
 Abdur-Raheem v. New Jersey Dep't of Corr., No. CV151743, 2017 WL 1050581 (D.N.J. Mar. 20,

25
 26 ³ Also, when asked on direct examination whether karaoke could be effectively mitigated, the State
 27 stated, "I do not [believe it could be]." [Record, at p. 116:1-4]. The justification given for this statement,
 28 however, centered on "limitation of resources," "extensive enforcement," inability "to enforce other
 measures," and "the cost of enforcement[.]" [Id., at 116:17-23]. As explained below in Section II, these
 explanations are invalid reasons to justify infringements on fundamental rights.

1 2017). In Raheem, the plaintiff challenged, on First Amendment grounds, the constitutionality of a
 2 rule that prohibited prisoner phone calls to cellular phones for any reason. Id. at *2. Like Nevada here,
 3 [Record, at pp. 116:17-18; 119:13-14], New Jersey attempted to justify its rule, in part, by claiming
 4 “that there is no ready alternative to the Cellphone Rule,” and its elimination “would place an
 5 ‘astronomical’ burden on the state[.]” Raheem, 2017 WL 1050581 at *14. The court rejected this
 6 justification, reasoning, “county jails *within* [New Jersey] do not have an absolute ban on calls to
 7 cellphones” and “the penal institutions of 49 other states, and the county penal institutions within [New
 8 Jersey] have all found alternatives.” Id. The same reasoning rings true here. Nevada does not have an
 9 absolute ban on other forms of speech and expression, or religion, which have similar COVID-19
 10 transmission risks, and could not point to a single other state that employs a complete ban on karaoke.
 11 [Record, at p. 150:6-9].

12 Again, just as Nevada does here, [Record, at p. 116:19-22], New Jersey attempted to justify its
 13 rule by urging it was necessary to permit enforcement of other rules. Raheem, 2017 WL 1050581, at
 14 *13 (“Defendants’ justification for having the Cellphone Rule is in part because of their own inability
 15 to enforce other rules.”). The court concluded that this justification “amounts to an argument that their
 16 own *lack of capacity* to prevent illegal activities warrants the prohibition of an arguably
 17 constitutionally protected act.” Id. (emphasis added).

18 Here, unlike the “arguably” protected act of prisoners making calls to cell phones, Cat’s
 19 karaoke is unquestionably protected by the First Amendment—a point the State has not once
 20 contested. The Raheem court went on to reject New Jersey’s justification stating, “the Bill of Rights
 21 was created to place the affirmative burden on the government to enact *and enforce* laws in ways that
 22 *do not infringe upon the rights of any individual[.]*” Id. (emphasis added). The District of New Jersey,
 23 in a fringe case regarding an “arguably constitutionally protected act,” unequivocally rejected the
 24 “inability to enforce” and “scarcity of resources” justifications Nevada attempts here. Id. Given that
 25 karaoke is unquestionably a protected act compared to the “arguably constitutionally protected act” of
 26 prison phone calls and given that narrow tailoring’s standard “has bite,” Raheem’s conclusion is
 27 warranted here: justifying a restriction on speech on the basis that the state cannot enforce lesser
 28

1 restrictive means cannot carry the State's burden. Permitting otherwise would be "giving the
 2 government carte blanche to restrict people's liberties under the guise of protecting them." Duncan,
 3 970 F.3d at 1168.

4 ***b. Are the Antecedent Assumptions the State Made to Arrive at its "Enforceability"
 Argument Warranted?***

5
 6 No. The State's justification factually presupposes its inability to enforce lesser restrictive
 7 means. The record belies the facts necessary for this assumption—the State admitted it has not utilized
 8 its full enforcement capability. [Record, at p. 145:3-4; 17-20]. The State admitted that local law
 9 enforcement is empowered to enforce the Directive's restrictions, yet, and for whatever reason, the
 10 State has not enlisted this cohort's help.⁴ [Record, at p. 145:17-20]. Thus, this "unenforceability" and
 11 "scantiness of resources" crises are of the State's own making, or, at best, premature.

12 Further, the State did not explain, with any specificity, how less restrictive means would be
 13 more difficult to enforce, *see* [record, at pp. 98-100; 105-06; *see also id.*, at p. 143:1-4 (admitting it
 14 would be easier to enforce a physical barrier requirement than a distance requirement)], or why
 15 enforcement through Cat's various licenses would not work, while claiming enforcement through
 16 licensure is sufficient for other businesses. [*Id.*, at pp. 90:10-15; 100; 125-28; 144-45]. What is more,
 17 Nevada currently permits ambient music, which it admits is a subjective standard that is difficult to
 18 enforce, yet ambient music is permitted—unmasked and within 25-feet of the audience. [*Id.*, at pp. 140-
 19 42]. And, the State permits "large venues" to self-police the restrictions placed on them, but will not
 20 permit Cat's to do the same. [*Id.*, at p. 154:15-18].

21 Finally, even with this assumption, if this Court were to find Plaintiff is substantially likely to
 22 succeed on its constitutional challenges to the Directive, the law is clear: a state never has an interest
 23 in enforcing an unconstitutional law. KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1272
 24 (11th Cir. 2006) ("[T]he city has no legitimate interest in enforcing an unconstitutional ordinance.");
 25 Gordon v. Holder, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is

26
 27 ⁴ As of Fiscal Year 2019/2020, the Las Vegas Metro Police Department had 3,300 sworn police
 28 officers. [Youngsma Decl., at ¶5].

1 always contrary to public interest.”). Thus, the State cannot assert, as justification for an
 2 unconstitutional law, its inability to enforce a constitutional one.

3 ***c. Can Making the Government’s Job Easier or More Efficient Justify Restricting First
 4 Amendment Rights?***

5 No. McCullen squarely addressed this issue. In attempting to justify a law that required
 6 abortion protestors to remain 35-feet from the entrance to an abortion clinic, the government argued
 7 “fixed buffer zones would ‘make our [the enforcing officials’] job so much easier.’” McCullen, 573
 8 U.S. at 495. In rejecting this justification, the High Court jested: “[o]f course they would.” Id. The
 9 Court then made clear that making the government’s life easier does not satisfy narrow tailoring
 10 because “the prime objective of the First Amendment is not efficiency.” Id. Impeding fundamental
 11 rights is supposed to be hard—this is precisely the reason why the narrow tailoring requirement “has
 12 bite” and requires a demanding and skeptical review. Duncan, 970 F.3d at 1165.

13 McCullen, recognized what Schneider v. State of New Jersey, Town of Irvington started nearly
 14 a century ago: choosing the path of least resistance for the sake of ease can never meet the narrow
 15 tailoring standard. 308 U.S. 147 (1939). In Schneider, various plaintiffs challenged several
 16 municipalities’ ordinances that prohibited distributing handbills in various public places. Id. at 154.
 17 The Court addressed an ordinance that required canvassers to receive a police officer’s preapproval of
 18 the canvassed literature before distributing it. Id. at 163-64. The city justified this requirement on the
 19 basis that it had an interest in preventing fraud and the means chosen were the most efficient. Id. at
 20 164. Rejecting this, the Court stated:

21 If it is said that these means are less efficient and convenient than bestowal of power on police
 22 authorities to decide what information may be disseminated from house to house, and who may
 23 impart the information, the answer is that *considerations of this sort do not empower a
 municipality to abridge freedom of speech and press.*

24 Id. at 164 (emphasis added). The “less efficient and convenient” means mentioned were the Court’s
 25 lesser restrictive hypotheticals of catching and punishing the trespassers and fraudsters. Id. Since 1939,
 26 courts of all levels have been striking down infringements on fundamental rights where the
 27

1 government's justification amounts to enforcing lesser restrictive means would be hard.⁵

2 **III. THE FREE SPEECH CLAUSE IS ENTITLED TO PROTECTIONS EQUAL TO
3 THOSE AFFORDED TO THE FREE EXERCISE CLAUSE**

4 Though speech and religion may be protected "by quite different mechanism[s]," Lee v.
 5 Weisman, 505 U.S. 577, 591 (1992), neither is favored over the other such that both are protected
 6 equally and with the same force. Prince v. Massachusetts, 321 U.S. 158, 164 (1944). In Prince,
 7 Massachusetts convicted a Jehovah's Witness of violating its child labor laws. Prince, 321 U.S. at 159-
 8 60. The plaintiff conceded her free speech claim but argued that the Free Exercise Clause afforded her
 9 greater protections. Id. at 164. The High Court rejected that argument stating, "it may be doubted that
 10 any of the great liberties insured by the First Article can be given higher place than the others. All
 11 have preferred position in our basic scheme." Id. The Court continued acknowledging differences in
 12 the two clauses, but concluded, "they have unity in the charter's prime place because they have unity
 13 in their human sources and functionings." Id. at 164-65. Indeed, even more modern Justices have
 14 recognized this notion: "The right to free exercise was a substantive guarantee of individual liberty,
 15 no less important than the right to free speech or the right to just compensation for the taking of
 16 property." City of Boerne v. Flores, 521 U.S. 507, 563 (1997) (O'Connor and Breyer, JJ., dissenting)
 17 (superseded by statute as stated in Holt v. Hobbs, 574 U.S. 352 (2015)); Id. at 564-65 (emphasis added)
 18 ("Given the centrality of freedom of speech and religion to the American concept of personal liberty,
 19 it is altogether reasonable to conclude that *both should be treated with the highest degree of respect*.).

20 Thus, the State may not, at least constitutionally, treat religion any different than Cat's
 21 expression.

22 // /

23

24

25 ⁵ E.g., Stanley v. Georgia, 394 U.S. 557, 567-68 (1969) (rejecting an argument that possession of
 26 obscene material could be justified as an incident under the statutory scheme prohibiting distribution,
 27 the Supreme Court stated the restriction on privately possessed obscenity "may not be justified by the
 28 need to ease the administration of otherwise valid criminal laws") (other citations omitted); O'Clair v.
United States, 470 F.2d 1199, 1204 (1st Cir. 1972) (noting "it is a fundamental principle of
 constitutional law requiring no citation that administrative convenience cannot justify infringement on
 constitutional rights").

CONCLUSION

WHEREFORE, for the reasons stated above, Cat's respectfully requests this Honorable Court enter a Preliminary Injunction barring enforcement of the Directives as originally requested.

Dated: January 25, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2021, copies of **PLAINTIFF'S POST-EVIDENTIARY HEARING BRIEF** was served via the Court's CM/ECF system as follows:

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